Supreme Court, U.S.
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No. 86-2041

In The

Supreme Court of the United States

October Term, 1986

EFFIE DELL CASSIDY, as guardian of the person of KENNETH CASSIDY, FLORIDA NATIONAL BANK, as guardian of the property of KENNETH CASSIDY, and SHARON CASSIDY, as wife of KENNETH CASSIDY,

Appellants,

v.

THE FIRESTONE TIRE & RUBBER COMPANY, a corporation, FORD MOTOR COMPANY, a corporation, and THE BUDD COMPANY, a corporation,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

MOTION OF APPELLEE THE BUDD COMPANY TO DISMISS OR AFFIRM

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QUESTION PRESENTED

Whether the State's intermediate appellate court's determination under state law principles to apply a State Supreme Court decision retroactively is correct under state law.

PARTIES TO PROCEEDINGS BELOW

Appellee, THE BUDD COMPANY (hereinafter referred to as "BUDD") has no correction to the listing by Appellants of the parties to the proceedings below. In compliance with Sup. Ct. R. 28.1, BUDD states that Thyssen, A.G. is the parent company of BUDD and Budd of Canada is a subsidiary which is not wholly owned by BUDD.

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No. 86-2041

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Appellants,

v.

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Appellees.

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

MOTION OF APPELLEE THE BUDD COMPANY TO DISMISS OR AFFIRM

RESPONSE TO STATEMENT OF THE GROUNDS

Pursuant to Rule 16 of the Rules of the Court, Appellee BUDD moves this Court to dismiss the appeal herein on the grounds that the federal question to be reviewed was not properly raised in or decided by the state courts and that the appeal does not present a substantial

federal question, Sup.Ct. R. 16.1(b), or, in the alternative, to affirm the judgment of the First District Court of Appeal of the State of Florida on the ground that "it does not present a substantial federal question." *Id.*

———o———

STATUTORY PROVISION INVOLVED

In pertinent part, 28 U.S.C. Section 1257 provides:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, maybe reviewed by the Supreme Court as follows
>
> . . .
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

———o———

STATEMENT OF THE CASE

Appellants' action is a product liability suit involving an injury which occurred more than twelve (12) years after the alleged defective product was delivered to the original purchaser. The pertinent dates are as follows. In 1975, the Florida Legislature enacted Section 95.031(2), Florida Statutes (1975), providing that actions for products liability must be begun within twelve (12) years after the date of delivery of the completed product to its original purchaser. In 1980, the Florida Supreme Court in *Battilia v. Allis Chalmers Manufacturing Co.*,

392 So.2d 874 (Fla. 1980) held that this twelve year statute of repose violated the access to courts provision of Article I, Section 21, of the Florida Constitution. The injury here occurred on February 6, 1982, after the decision in *Battilia,* but more than twelve years after the delivery of the product to the original purchaser. After this action was filed and before any trial on the merits, the Florida Supreme Court in *Pullum v. Cincinnati, Inc.,* 476 So.2d 657 (Fla. 1985), receded from *Battilia* and upheld the constitutionality of the statute of repose. The BUDD COMPANY, a defendant, filed a motion in the state trial court for summary judgment based upon this statute of repose and prevailed. The First District Court of Appeal affirmed finding that there was no cause to depart from the general rule that a decision overruling earlier precedent is generally given retroactive effect. The Florida Supreme Court denied Appellants' petition for discretionary review.

———o———

ARGUMENT

I.

This Court has no jurisdiction over this appeal as the validity of the State statute was not properly drawn in question on federal grounds.

Appellants have invoked this Court's jurisdiction under 28 U.S.C. Section 1257(2). In order to establish the jurisdiction of this Court under either appeal or certiorari, the validity of the State statute must be drawn in question on the grounds that the statute is repugnant to the Constitution, treaties or laws of the United States. 28 U.S.C. Section 1257(2) and (3). This appeal is not prop-

erly within the jurisdiction of this Court because Appellants failed to properly challenge the validity of the twelve year statute of repose (Section 95.031(2), Florida Statutes) before the state courts on federal constitutional grounds.

It is essential to this Court's jurisdiction that the federal question be properly raised in the state court proceedings. *Cardinale v. Louisiana,* 394 U.S. 437, 439 (1969). A federal claim cannot be considered by this Court unless it has been raised in the state court or considered and resolved by the state court. *See McGoldrick v. Compagnie Generale Transatlantique,* 309 U.S. 430, 434 (1940); *Hill v. California,* 401 U.S. 797, 805 (1971). The proper method for raising a Federal question is dependent upon the particular state's practice. *See Central Union Co. v. Edwardsville,* 269 U.S. 190 (1925).

This appeal was filed from the "decision" of the Supreme Court of the State of Florida. As evidenced by Appellants' brief, the Florida Supreme Court merely denied a petition for review filed under Article V, Section 3(b), of the Florida Constitution (1980). The appeal filed by Appellants in the Florida Supreme Court was filed pursuant to Article V, Section 3(b)(3), which provides:

> The Supreme Court *may* review any decision of a district court of appeal that expressly declares valid a state statute, or that expressly construes a provision of the state or Federal Constitution, or that expressly affects a class of constitutional or state officers, or that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law. (Emphasis added.)

Accordingly the Supreme Court's decision to review this matter was discretionary and the denial of review is not a decision on the merits.[1] *See Southern Bell Telephone and Telegraph Co. v. Bell*, 116 So.2d 617, 619 (Fla. 1959). Thus, it is the First District Court of Appeal's decision which must be reviewed to determine whether the validity of the State statute was properly drawn in question.

A review of the decision of the First District Court of Appeal, which decision is contained in the appendix to Appellants' jurisdictional statement, makes clear that the First District did not consider or resolve in any fashion the federal constitutional claim that Appellants pose before this Court. The decision is based *solely* on State law.[2] When the highest court of the State from which review may be obtained fails to pass on a federal question, it is presumed that the omission was due to want of proper presentation. *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n.6 (1983). This presumption is fully sub-

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[1] As the Florida Supreme Court decision did not pass on the merits of the case, the present appeal should have been filed, if at all, from the decision of the intermediate state appellate court —the First District Court of Appeal of the State of Florida. *Sullivan v. Texas*, 207 U.S. 416 (1908); *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157, 160 (1954); *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 678 n.1 (1968); and *Callan v. Bransford*, 139 U.S. 197 (1891).

[2] The First District cites several federal court cases in footnote 3 of its opinion. This citation, however, was merely to demonstrate that courts have been reaching varying results as to retroactive application of *Pullum*. In any event, a mere passing reference to federal cases does not invoke this Court's jurisdiction. For example, in *Osborne v. Clark*, 204 U.S. 565, 27 S.Ct. 319, 320 (1907), this Court noted that the mere citation to this Court's decisions was not sufficient to raise a federal question.

stantiated in the present appeal as Appellants' initial and reply briefs to the First District Court of Appeal contain no reference to the United States Constitution nor any reference, even by implication, to the federal issue. *See* Appendix. Thus, it is clear that Appellants did not properly raise the Federal question before the First District Court of Appeal nor did the court resolve the issue.[3]

The Appellants did assert a federal issue before the trial court but this is not sufficient under Florida law to preserve the issue. Florida law provides that the failure to brief an issue on appeal is deemed an abandonment of that issue, *City of Miami v. Steckloff,* 111 So.2d 446, 447 (Fla. 1959). Appellants attempted to raise a federal issue as grounds for the petition for rehearing before the First District Court of Appeal. Florida law, however, is equally clear that raising an issue for the first time in a motion for rehearing before an appeal court waives the issue. *Nelson v. Seldon Cypress Door Co.,* 83 So. 86 (Fla. 1919).

Accordingly, the failure of Appellants to properly raise and preserve the issue presented by this appeal during the state appellate process defeats this Court's appeal jurisdiction. *Beaty v. Richardson,* 276 U.S. 599 (1928).

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[3] Although the Amicus Brief before the First District Court of Appeal did not attempt to raise a federal question, the law in Florida is that an Amicus may not raise constitutional issues which have not been raised by the appellant and that any such argument is not considered by the appeal court. *Action II v. Fort Lauderdale Hospital,* 418 So.2d 1099, 1100-1101 (Fla. 1st DCA 1982), *affirmed,* 440 So.2d 1282 (Fla. 1983), and *Higbee v. Housing Authority of Jacksonville,* 143 Fla. 560, 197 So. 479, 485 (Fla. 1940).

Wherefore, BUDD respectfully requests that this Court dismiss Appellants' appeal for lack of jurisdiction.[4]

II.

The case presents no substantial question not previously decided by this Court.

Without conceding in any measure BUDD's position that this appeal is not subject to the jurisdiction of this Court, BUDD now shows that in any event this matter does not present a substantial federal question.

At the outset, it should be noted that this is not a case of far reaching implications. The statute in issue has been repealed by the Florida Legislature. This is a peculiar case which arose only because of a flux in the decisional law of the State of Florida during less than a five year period. Appellants' claim was barred under the twelve year statute of repose before it arose. Appellants assert an entitlement to bring suit notwithstanding that bar because the injury at issue occurred *after* the Florida Supreme Court first ruled on the constitutionality of that bar under state law but *before* the Florida Supreme Court finally decided in *Pullum v. Cincinnati, Inc.*, 476 So.2d 657 (Fla. 1985), that the twelve year bar passes muster under the state constitution. Appellants contend that they must get the benefit of the earlier ruling but the federal constitution precludes the retrospective application of the latter ruling. The short answer to this contention is that, "[t]he Constitution neither *prohibits* nor requires retrospective effect. As Justice Cardoza said, 'We think the

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[4] This is not a proper appeal in any event. Even on state law grounds, Appellants did not challenge below the validity of any state statute, but simply the retrospective application of a state Supreme Court decision.

Federal Constitution has no voice upon the subject.' " *Linkletter v. Walker,* 381 U.S. 629, 85 S.Ct. 1731, 1737 (1965).

In essence, Appellants assert that the retroactive application of the Florida Supreme Court decision of *Pullum v. Cincinnati, Inc.,* 476 So.2d 657 (Fla. 1985), destroyed Appellants' property right in an accrued cause of action and thereby violated his federal due process rights under the Fourteenth Amendment to the United States Constitution. It is especially clear here that this argument is without merit because, as this Court has held, there is no vested property right in a pending tort claim:

> Our cases have clearly established that '[a] person has no property, no vested interest, in any rule of common law.' *Second Employers' Liability Cases,* 223 U.S. 1, 50, 32 S.Ct. 169, 175, 56 L.Ed. 327 (1912), quoting *Munn v. Illinois,* 94 U.S. 113, 134, 24 L.Ed. 77 (1877). The Constitution does not forbid the creation of new rights or the abolition of old ones recognized by the common law, to attain a permissible legislative object, *Silver v. Silver,* 280 U.S. 117, 122, 50 S.Ct. 57, 58, 74 L.Ed. 221 (1929), despite the fact that 'otherwise settled' expectations may be upset thereby. *Usury v. Turner Elkhorn Mining Co.,* 428 U.S. 1, 16, 96 S.Ct. 2882, 2829, 49 L.Ed. 2d 752 (1976) . . . Indeed, statutes limiting liability are relatively commonplace and have consistently been enforced by the Courts.

Duke Power Company v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 98 S.Ct. 2620, 2638 n.32 (1978). As there is no vested property right in a pending tort claim there is no merit to Appellants' challenge under the Fourteenth Amendment.

The decisions of this Court cited in Appellants' brief are not on point. Those cases either involve parties' attaining a property right by actions other than the mere filing of a lawsuit or they address the question of what

procedures a State must afford a party who has a recognizable cause of action, *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432, 102 S.Ct. 1148, 1156 (1982) and *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 678, 50 S.Ct. 451, 453 (1930). For example, *Coombs v. Getz*, 285 U.S. 434, 52 S.Ct. 435 (1933), specifically noted that the property right of the party there was not based solely upon the repealed statute but arose from the contractual liability incurred by the party in reliance upon the statute. The Court noted that upon the incurring of the contractual liability the party immediately acquired a right which existed independently and survived the abolition of the statutory provision which gave it birth. *Id.* at 436. *Ettor v. Tacoma*, 228 U.S. 148, 155-156 (1913), involved rights vesting because of changes to real property made in reliance upon a statute. In the cases cited by Appellants because the rights had "vested" in real property, a contract[5] or otherwise in *reliance* upon a statute, those rights were found to stand independent of the statute that created them and could not be abridged by a subsequent statute. Appellants' situation is quite different. Appellants did not acquire any contract or property rights in reliance upon or independent of the overruled decision. Accordingly, Appellants have no constitutional right to preclude retroactive application of the *Pullum* decision notwithstanding

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[5] *Pritchard v. Norton*, 106 U.S. 124, 132-133, 1 S.Ct. 102, 108-109 (1882) merely states that a vested right of action is in property interest. It does not define when a right of action becomes vested. The Court notes, "A vested right to an existing defense is equally protected saving only those which are based on informalities not affecting substantial rights, which do not touch the substance of the contract and are not based on equity and justice."

that the decision sustains the viability of a statute that extinguishes their claims.[6]

In addition, Appellants can have no greater property interest in their tort claim than is established by Florida law. The nature and scope of any interest in a pending tort claim is as defined by Florida law. Under Florida law, a judicial decision overruling earlier precedent is generally given retroactive effect whereby judicial construction of the statute is deemed to relate back to the statute. *Florida Forest and Park Service v. Strickland,* 18 So.2d 251 (Fla. 1944). So, too, this Court has held that a court must apply the law in force at the time of its decision, even if it is hearing the case on appeal from a judgment entered pursuant to prior law. *United States v. The Schooner Peggy,* 5 U.S. (1 Cranch) 103, 110, 2 L.Ed. 44 (1801). Assuming *arguendo* that Appellants had a property interest in their claim, that interest was not vested as against subsequent judicial modification.

In *Martinez v. California,* 444 U.S. 277, 100 S.Ct. 553, 557 (1980), this Court noted the State's interest in fashioning its own rules of tort law is paramount to any discernable federal interest, but that an exception exists to the federal interest in protecting individual citizens from state action which is wholly arbitrary or irrational. The Florida Supreme Court in *Pullum v. Cincinnati, Inc.,* 476 So.2d 657 (1985), *appeal dismissed,* 106 S.Ct. 1624, 90 L.Ed. 2d 174 (1976), determined that the Legislature had a rational basis for enacting the statute in issue. "The

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[6] As to cases addressing procedural due process, this Court in *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 432, 102 S.Ct. 1148, 1156 (1982), distinguished between the ability of the State to create and abolish causes of action from the deprivation of appropriate procedural safeguards.

legislature, in enacting this statute of repose, reasonably decided that perpetual liability places an undue burden on manufacturers, and it decided that twelve years from the date of sale is a reasonable time for exposure to liability for manufacturing of a product." *Id.* at 659. *Pullum* was appealed to this Court which dismissed the appeal for lack of a substantial federal question. Thus, it cannot be said that the statute of repose is arbitrary or capricious, or that application of that statute to the instant action deprives Appellants of a property right without due process of law. Accordingly, there is no vested property interest in a pending tort claim and thus the claim that the Fourteenth Amendment was violated is clearly in error and does not present a substantial federal question. Wherefore, Appellee BUDD requests that this appeal be dismissed for want of a substantial federal question, or that the decision below be summarily affirmed.

—o—

CONCLUSION

Wherefore, BUDD respectfully submits that this appeal is dismissed for want of jurisdiction or for want of a substantial federal question or alternatively that it be summarily affirmed because it does not present a substantial federal question.

Respectfully submitted,

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APPENDIX TO MOTION OF APPELLEE THE BUDD COMPANY TO DISMISS OR AFFIRM

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Motor Vehicle Manufacturers
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FIRST DISTRICT, STATE OF FLORIDA

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Appellants,	)	DOCKET NO. BK-198
v.	)	
THE FIRESTONE TIRE AND RUBBER COMPANY, a corporation, FORD MOTOR COMPANY, a corporation, and THE BUDD COMPANY, a corporation,	)	CASE NO. 83-1934-CA-01
Appellees.	)	

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PRELIMINARY STATEMENT

Appellants-plaintiffs Effie Dell Cassidy, as guardian of the person of Kenneth Cassidy, and Sharon Cassidy, as wife of Kenneth Cassidy will be referred to as "Cassidy", "the Plaintiffs", or "Kenneth Cassidy". Appellee-defendants Firestone Tire and Rubber Company, Ford Motor Company and the Budd Company will be referred to as "Firestone", "Ford" and "Budd" respectively, or as "defendants".

References to the record will be designated "R. —".

All emphasis is supplied unless otherwise stated.

ISSUE PRESENTED FOR REVIEW

The sole issue in this appeal is whether the Circuit Court erred in applying the decision of the Florida Supreme Court in the case of *Pullum v. Cincinnati, Inc.*, 476 So.2d 657 (Fla. 1985) retroactively to appellants' action which was instituted in reliance on and in conformity with the existing law pronounced by the Supreme Court in *Battilla v. Allis Chalmers,* 392 So.2d 874 (Fla. 1980) prior to *Pullum.*

STATEMENT OF CASE AND FACTS

This is an appeal by plaintiffs from the final judgment of the Circuit Court for Escambia County, First Circuit, dismissing plaintiffs' action (R-51) on motions for summary judgment by defendants (R-29, R-43, R-46).

The cause of action involved herein accrued on February 6, 1982, when plaintiff, Kenneth Cassidy, was injured by the explosion of a multi-piece rim wheel (R-2) manufactured and marketed by defendants (R-10, R-14,

R-22) which admittedly was delivered to the original purchaser more than twelve years prior to Cassidy's injury.

The case on appeal to this Court was commenced on June 2, 1983, by Effie Dell Cassidy, as guardian of the person of Kenneth Cassidy who, as a result of his massive bodily and head injuries, has been adjudged mentally incompetent (R-1, R-4). See R-52.

As a products liability action which accrued after the decision of the Supreme Court in *Battilla v. Allis Chalmers,* 392 So.2d 874 (Fla. 1980) construing Section 95.031(2) Florida Statutes as *unconstitutional* and long before the decision of the court in *Pullum v. Cincinnati, Inc.,* 476 So.2d 657 (Fla. 1985) construing Section 95.031(2) as *constitutional,** the gravamen of plaintiffs' complaint is that plaintiff Kenneth Cassidy's injury would not have occurred but for the fact that, despite defendants' repeated notice and knowledge over a prolonged period of time that their multi-piece rim wheels were causing numerous deaths and injuries, defendants failed and refused to discontinue production of its dangerously defective product when defendants knew that it could and should have been replaced by a safe product (R-4); defendants failed and refused to provide any warning to inform and protect the public against the dangers to life and limb inhering in defendants' multi-piece rim wheel product (R-4); defendants, although urged to do so, failed and refused to recall its dangerously defective multi-piece rim

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* The decision in *Battilla v. Allis Chalmers,* supra, was rendered on December 11, 1980; plaintiff Kenneth Cassidy was injured on February 6, 1982; plaintiffs' action was instituted on June 2, 1983; the decision in *Pullman v. Cincinnati, Inc.,* supra, was rendered on August 29, 1985.

wheel product (R-4), any one of which actions defendants failed and refused to take would have served to save plaintiff and numerous other victims from deaths and injuries caused by defendants' multi-piece rim wheel product.

SUMMARY OF ARGUMENT

Appellants' argument will show that to the general rule of prospective/retrospective operation of an overruling decision, there is an exception which, over a period of many years, has become well established as a separate rule, best characterized as *The Rule Against Applying an Overruling Decision Retroactively to the Overruled Decision.*

The basis and application of this rule is set forth under the points of appellants' argument, demonstrating that where a statute has been held unconstitutional by a court of last resort and the Court later reconsiders its prior construction of the statute and declares it to be constitutional, the rights of the parties acted on in reliance upon the law rendered, are not to be denied by applying retroactively the changed construction of the statute embodied in the overruling decision. *Lee v. Bond-Howell Lumber Co.* 166 So. 733, 738 (Fla. 1936), *Gelpcke v. City of Dubuque* 1 Wall 175, 17 L.Ed. 520, 525, 526, *Florida Forest and Park Service v. Strickland* 18 So2d 251, 253 (Fla. 1944), citing case and language in *State ex rel. Midwest Pipe & Supply Co. v. Haid* 52 SW 183, 184, 185 [Mo. Sup. Ct. (1932)], Appellant Kenneth Cassidy's cause of action accrued on February 6, 1982, and he acted in accordance with his rights therein under the law existing prior to the August 29, 1985 decision of the Supreme Court in *Pullum v. Cincinnati, Inc.*, supra.

Under the recited principles of the law on nonretroactivity applicable to the facts of plaintiffs' case *Pullum* is not, properly, to be applied retroactively to plaintiffs' actions.

PREFACE TO ARGUMENT

The Judgment of the Circuit Court is Contrary to the Existing Rule of Law *Against* Retroactively (Retrospectively) applying an Overruling Decision to *the Cases of Parties Who Conformed Their Acts to the Overruled Decision.* Accordingly, the Summary Judgment of the Circuit Court Below Should be Set Aside.

The rationale of the stated rule is demonstrated by the cases and authorities embodied in the points of Appellants' Argument set forth.

APPELLANTS' ARGUMENT

I.

THE ROOT OF THE ESTABLISHED RULE AGAINST APPLYING AN OVERRULING DECISION RETROACTIVELY TO THE OVERRULED DECISION IS FOUNDED IN EARLY AMERICAN STATE AND FEDERAL COURT DECISIONS.

The present prevailing rule of law against retroactive application of any overruling decision to the overruled decision represents a full course departure of our courts from our inheritance of the common law of England which bound itself to the theory of retroactive application.[1]

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[1] Blackstone Commentaries *69

Refusal of State and Federal courts of America to adhere to the English rule of law on retroactivity began more than a century ago. *Gelpcke v. City of Dubuque,* supra (cited by the *Florida Forest and Park Service v. Strickland,* supra) was decided by the U. S. Supreme Court in 1863. In *Gelpcke* the Iowa Supreme Court first, in 1853, construed as constitutional a statute enacted by the Iowa legislature; then, some six years later, in 1859, construed the subject statute as unconstitutional. The Supreme Court held that the 1859 overruling decision could not be applied retroactively to its overruled 1853 decision. After stating "[h]owever we may regard the late case in Iowa as affecting the future, *it can have no effect on the past",* the court affirmed the rule that a decision "altering the construction of the law" pronounced by the court in a prior decision may not be applied retroactively to the court's prior decision.

At close, the Court stated:

> "The same principle applies where there is a change of judicial decision as to the constitutional power of the Legislature to enact the law . . . *It rests upon the plainest of principles of justice.* To hold otherwise would be as unjust as to hold that rights acquired under a statute may be lost by its repeal."

In another case cited by the Florida Supreme Court as an authority for its decision in *Florida Forest and Park Service,* the Supreme Court of Missouri in Banc amplified full meaning of the principle enunciated by the Court in *Gelpcke* when it stated:

> "The generally accepted rule is to the effect that the judicial construction of a statute by a court of last resort *becomes as much a part of the statute as*

> *the text itself,* and a *subsequent change* in the construction of a statute *by judicial decision of the court of last resort,* is the same, in effect, *as if the statute had been amended by legislative enactment.* (Cits)
>
> "Consequently the courts have established and adopted the rule that, where a statute or law has received a given construction by a court of last resort, the rights, positions, and course of action *of parties who have acted in conformity with and in reliance upon such construction* of the statute are not in any wise impaired or disturbed by reason of a change in the construction of the same statute made by a subsequent decision of the court of last resort, in overruling its former decision, and the effect of the change in judicial construction is that it operated *prospectively, and not retrospectively,* in the same manner as though the statute or law has been amended by the Legislature. *State ex. rel. Midwest Pipe & Supply Co. v. Haid,* 52 SW2d, 183, 184, 185 (Mo. Sup. Ct. 1932)"

The Circuit Court's judgment dismissing Plaintiffs' case by applying retroactively the decision of the Supreme Court in *Pullum v. Cincinnati, Inc.,* 476 So.2d 657 (Fla. 1985) is in error in that it is contrary to the rule against applying an overruling decision to the cases of parties, as Cassidy, who conformed their acts to the overruled decision.[2] *Gelpcke v. City of Dubuque,* 1 Wall 175 17 L.Ed. 520 (U.S. Sup. Ct. 1863), *State ex. rel. Midwest Pipe & Supply Co. v. Haid,* 52 SW2d 183 (Mo. Sup. Ct. 1932), *Florida Forest and Park Service v. Strickland,* 18 So.2d 251 (Fla. 1944).

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2. In this case *Battilla v. Allis Chalmers,* supra

II.

THE *"RELIANCE FACTOR"* IS A SIGNIFICANT COMPONENT OF THE RULE AGAINST APPLYING AN OVERRULING DECISION RETROACTIVELY TO THE OVERRULED DECISION.

The courts and legal scholars, universally, hold that the reliance of the parties on the law of a prior decision of a court of last resort is the most compelling reason for not allowing the overruling law of a later decision of the same court to be applied retroactively to the overruled law of its prior decision. *Reliance* is easily recognized and understood as a significant component of the rule against applying an overruling decision retroactively because the rule it supports springs from natural laws of justice and fairness.[3]

The Florida Supreme Court in *Florida Forest and Park Service v. Strickland,* supra, refused to apply its overruling decision [*Johnson v. Midland Constructors, Inc.,* 7 So.2d 449 (Fla. 1942)] to claimant Strickland who had acted in reliance on the Court's overruled decision [*Tigertail Quarries, Inc. v. Ward,* 16 So.2d 812 Fla. 1944)].

In *Florida Forest and Park Service,* the Court cited *Culpepper v. Culpepper,* 3 So.2d 330 (Fla. 1941) to emphasize that the law in effect at the time a party acts in accordance with his rights is the law that applies and is to be abided as against the law declared differently in the Court's overruling decision. In *Culpepper* the Court refused to dismiss Culpepper's action by retroactively applying to it

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[3] 47 Harvard Law Review 1403, *The Effect of Overruled and Overruling Decisions on Intervening Transactions.*

18 Columbia Law Review 230, *The Protection Afforded Against Retroactive Operation of an Overruling Decision.*

the Court's overruling decision (*Evans v. Evans,* 194 So. 215 (Fla. 1940) to its overruled decision [*Southern Brewing Co. v. May,* 165 So. 627 (Fla. 1936)].

The Court in *Culpepper* summarized the gist of its decision:

> "Under the factual conditions as disclosed by the record, we must hold that the Defendant had the right to rely upon the decision of this court in the *Southern Brewing Co.* case."

Similarly, at the time appellant Cassidy's cause for action accrued (February 6, 1982) (R. 1), he acted upon rights therein by instituting the lawsuit herein under the law as it existed at the time (*Battilla v. Allis Chalmers,* supra.)

In *Simmons v. City of Coral Gables,* 186 So.2d 493, 495 (Fla. 1966), the Court explained: "The accident occurred on October 31, 1962, and therefore, the statutory and decisional law pertinent on that date must prevail" c/f *Kerce v. Coca-Cola Company-Foods Division,* 389 So.2d 1177 (Fla. 1980).

Likewise, in *Lee v. Bond-Howell Lumber Co.,* 166 So. 733, 738 (Fla. 1936) where the Supreme Court refused to apply its overruling decision to the case of a party who had acted in reliance on the Court's prior decision constructing the statute involved as "partly void" and unconstitutional, the Court stated:

> "[I]f a practical situation has come about during which it appears that a statute was declared void, or a particular construction of it adopted at one time, and afterwards, on a reversal of the judicial review, the courts have at a later date reconsidered and adjudged such statute to be valid or construed it differently, then intervening transactions should be governed and *pre-*

> *existing rights involved there, according to the rule of the first judicial decision rendered,* so long as that judicial decision was allowed to stand and be understood and *acted on* by the people as the applicable law of the land for the time being."

A review of the cases demonstrated that the Florida Supreme Court has consistently adhered to the rule against applying its overruling decision to the overruled decision where to do so would serve to destroy the rights of parties which accrue and are acted on in the interim in reliance on and in conformity with the prevailing law of the overruled decision.[4]

III.

THE DOCTRINE OF FAIRNESS IS THE SUBLIMINAL FACTOR THAT UNDERLIES THE RULE AGAINST APPLICATION OF AN OVERRULING DECISION TO THE OVERRULED DECISION.

The rule against applying an overruling decision to the overruled decision where to do so would serve to destroy the rights of parties which accrue and are acted on in

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[4] The Supreme Court in *Bauld v. J. A. Jones Construction Co.* 357 So.2d 401 defined Section 95.11(3)(a) [analogous to Section 95.031(2)] as a *statute of repose* as distinguished from a statute of limitation. The court, speaking through Justice Boyd, explained:

> "Rather than establishing a time limit within which action must be brought, measured from the time of accrual of the cause of action, *these provisions cut off the right of action* after a specified time measured from the delivery of a product or the completion of work. They do so *regardless of the time of accrual of the cause of action* or *notice of the invasion of a legal right.*"

the interim in reliance on and in conformity with the prevailing law of the overruled decision stems from clear principles of justice and fairness which underlie its adoption and enforcement by the courts. In the last cited case in Point II, *Lee v. Bond-Howell Lumber Co.*, supra, the Court observed:

> "This rule has been adopted because the unjustice of any other rule would be so great as to be judicially intolerable."

In *Chevron Oil Company v. Huson*, 404 US 97, 30 L.Ed.2d 296, 92 S Ct 349, the Court refused to dismiss plaintiff's cause by applying its decision in *Rodriques v. Aetna Casualty & Surety Co.*, 395 US 352 retroactively to *Chevron*, a pending case, *as Cassidy at the time of the decision in Pullum.* In addressing the issues of fairness in *Chevron*, the Court asserted:

> "To abruptly terminate this lawsuit that has proceeded through *lengthy* and no doubt, *costly discovery stages* for a year would surely be inimical to the beneficial purposes of the Congress."

Fairness is certainly a paramount consideration involved in the question of retroactivity in the present case herein on appeal. To apply *Pullum* retroactively to Cassidy after acting on the existing law and proceeding through lengthy and costly stages of discovery for more than two years would be as much unfair as noted by the Court in *Chevron.* In Cassidy, progressing through two and one-half years of discovery proceedings has involved hundreds of interrogatories, inspection of exhibits, requests for admissions, production of documents and numerous depositions requiring large numbers of hours at work and thousands of dollars in expenses in preparing the case.

Such a costly undertaking would not have been entered and pursued over a period of more than two and one-half years to near-point of full readiness for trial[5] without *a reliance, as evidenced,* on the law which existed at the time plaintiff instituted his action and which prevailed until *Pullum.*

CONCLUSION

The foregoing points of this brief demonstrate that under the rule against applying the law of an overruling decision retroactively to the law of the overruled decision, where to do so would serve to destroy the rights of parties which accrue and are acted on in the interim in reliance on and in conformity with the prevailing law of the overruled decision—as did plaintiff Kenneth Cassidy in the instant case—renders erroneous the judgment of the Circuit Court in dismissing plaintiff's action by applying retroactively the decision in *Pullum v. Cincinnati, Inc.,* supra.

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ATTORNEYS FOR APPELLANTS

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[5] The case was already set for trial January 27, 1986, by order of the Court, September 25, 1985.

CERTIFICATE OF SERVICE

I hereby certify that a copy hereof has been furnished to

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by mail this 7th day of March, 1986.

/s/ Thomas T. Remington
Attorney for Appellants

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

EFFIE DELL CASSIDY, etc., et al,	)	
Appellants,	)	
v.	)	DOCKET NO. BK.198
THE FIRESTONE TIRE AND RUBBER COMPANY, et al,	)	CASE NO. 83-1934-CA-01
Appellees.	)	

APPELLANTS REPLY BRIEF TO ANSWER BRIEFS OF APPELLEES FORD MOTOR COMPANY, THE BUDD COMPANY, THE FIRESTONE TIRE AND RUBBER COMPANY, AND PARTIES AMICI CURIAE, FLORIDA DEFENSE LAWYERS ASSOCIATION, AND MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., AND PRODUCT LIABILITY ADVISORY COUNCIL, INC.

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PRELIMINARY STATEMENT

1. Appellants reply brief will undertake to adequately reply to all answer briefs at the same time endeavoring *to stick as closely as possible to the real issue of this appeal,* to avoid further compounding the large volume of argument generated by the six answer briefs of parties Appellee and amici curiae, respectively. The arguments of Appellees Ford, Budd and Firestone are addressed both separately and compositively in the main body of Appellants reply brief. Reply to amici curiae briefs, incorporating opinions of lower state and federal courts, is set forth in the appendix of Appellants reply brief.

2. The table of reference provided in the Preliminary Statement of Appellants initial brief is incorporated in Appellants reply brief herein,[1] supplemented as follows:

References to Answer Brief of:	Designated by:
Ford Motor Company	"FB ——————"
The Budd Company	"BB ——————"
Firestone Tire and Rubber Company	"TB ——————"
Cassidy Initial Brief	"CIB ——————"
Cassidy Reply Brief	"CRB ——————"
Reply Brief Appendix	"A ——————"

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[1] Transmitted for Convenience of Court:

Appellant-Plaintiffs Effie Dell Cassidy, as guardian of the person of Kenneth Cassidy and Sharon Cassidy, as wife of Kenneth Cassidy, will be referred to as "Cassidy", "the Plaintiffs" or "Kenneth Cassidy". Appellee-Defendants Firestone Tire and Rubber Company, Ford Motor Company and The Budd Company will be referred to as "Firestone", "Ford" and "Budd" respectively, or as "Defendants". References to the Record will be designated "R —". All emphasis is supplied unless otherwise stated.

SUMMARY OF ARGUMENT

The content of Appellants reply brief herein, we respectfully submit, will demonstrate to the Court that the answer briefs of Appellees and parties amici curiae do not address an answer to the governing principles of law applicable to the facts of this appeal succinctly set forth as follows:

> *"Where a statute or law has received a given construction by a court of last resort, the rights, positions and courses of action of parties who have acted in conformity with and in reliance upon such construction of the statute are not in anywise impaired or disturbed by reason of a change in the construction of the same statute made by a subsequent decision of the court of last resort, in overruling its former decision."*

The answer briefs of Appellees and parties amici curiae do not address the stated principle of the law against applying the overruling decision of a court retroactively to its overruled decision. Appellees answer briefs fail to discredit it or offer any authority from the cases to contradict it. In failing to do so, Appellees fail, at start, to meet the test of their contention that *Pullum v. Cincinnati, Inc.*, 476 So.2d 657 (Fla. 1985) should be applied retroactively to Cassidy.

The principle of law against applying an overruling decision of a Court retroactively to its overruled decision stands in this Court on the ong land firmly established authority of *Florida Forest and Park Service v. Strickland,* 18 So.2d 251 (Fla. 1944). Unable to still the voice of the Florida Supreme Court in Strickland, Appellees seek desperately to find ways to get around *Strickland.* The ways they suggest to the Court are (a) that the Court

deem the aforestated principle of law embodied in *Strickland* as applicable only to cases involving contract or property rights and (b) that without a "prospective only" proviso *Pullum* must be applied retroactively notwithstanding *Strickland.* In Appellants reply brief, both of these claims are shown to have no validity, particularly as to claim (a) at page 11 of the reply brief as to claim (b) at page 15 of reply brief.

Appellees, recognizing the instant case to be firmly lodged in the aforestated applicable law of this appeal, finally attempt to theorize to this Court that Section 95.031(2) Florida Statutes as to existed *prior* to *Battilla v. Allis Chalmers,* 392 So.2d 874 (Fla. 1980), should be applied to *Cassidy,* a case brought on the state of the law after *Battilla* when Section 95.031(2) did not exist. At page 23 of reply brief the fallacy of Appellees theory is demonstrated.

In short, the many pages of the answer briefs of Appellees and parties amici curiae do not rebut the facts and applicable law of this appeal which sustain Appellants position that *Pullum* should not be applied retroactively to *Cassidy* and reply Appellees positions to the contrary.

ARGUMENT

No. 1 Reply to Answer Brief of Appellee Ford Motor Company

PART I APPELLEE FORD'S ANSWER BRIEF IS NOT ADDRESSED TO *AND DOES NOT REBUT* THE POINTS OF APPELLANTS BRIEF AGAINST APPLYING *PULLUM* RETROACTIVELY

First: Appellee Ford's Brief Leaves Standing Against Ford's Position the Principal of Law Em-

bodied in Point I of Appellants Initial Brief That an Overruling Decision of a Court of Last Resort Changing Its Construction of a Statute Is Not To Be Applied Retroactively to a Party's Cause of Action Accruing and Commenced in Conformity with and In Reliance Upon the Court's Prior Construction of the Same Statute

Point I of Appellants brief confronted Ford with the following statement of law enunciated by the Florida Supreme Court in *Florida Forest and Park Service v. Strickland,* 18 So.2d 251 (Fla. 1944):

> "(W)here a statute or law has received a given construction by a court of last resort, the rights, positions, and course of action of parties who have acted in conformity with and in reliance upon such construction of a statute are not in anywise impaired or disturbed by reason of a change in the construction of the same statute made by a subsequent decision of the court of last resort overruling its former decision." (CIB-8)

This statement of law stands squarely against Ford's contention that *Pullum* should be applied retroactively to Cassidy. Yet, Ford's *answer* brief does not address it, question it, challenge it or rebut it.

Failure of Ford's *answer* brief to answer Point 1 of Appellants brief telling demonstrates and concedes that in its search of the cases for authority to overturn this statement of law, Ford found nothing.[2] The operative facts of

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[2] Indeed, in Plaintiffs reasonably extensive research of the law applicable to overruling decisions of court no cases or authority were found that contradicted or disputed this statement of law and the reasoning of the courts their adherence to it.

Cassidy are clear and undisputed. Plaintiff Kenneth Cassidy's cause of action accrued and was commenced in Court subsequent to the Supreme Court's construction of Section 95.031(2) in *Battilla* and prior to the Court's changed construction of Section 95.031(2) in *Pullum,* thus placing Cassidy squarely within the ambit of the heretofore recited law against retroactivity. Even Ford in its answer brief expresses conclusions admitting of facts which place Cassidy's action within the ambit of law against retroactivity, e.g.

> "Since the *Battilla* decision in 1980 and until the Supreme Court's decision in *Pullum* in 1985, Section 95.031(2) has had *no effect* in banning the filing of a suit." (FB-4)
>
> "The Supreme Court's decision in *Battilla* allowed Cassidy to file a suit which would have been otherwise banned by the clear and direct application of Section 95.031(2) Florida Statutes (1975)." (FB-6)

Clearly, such admissions appearing in Ford's brief are not rebuttal to Plaintiffs case; they acknowledge its validity.

Point I of Appellants brief stands at the threshold of the law and argument of Appellants case requisite for Ford to controvert. In failing to address or rebut it, Ford's position contrary to Cassidy's case against retroactive application of *Pullum* goes down at the outset.

> *Second*: Ford's Answer Brief Misconstrues the Relevancy of the *Reliance Factor* and *Doctrine of Fairness* Embodied in Points II and III, Respectively, of Appellants Brief.
>
> At FB-2, Ford contends:
>
> "(N)o reliance on the *Battilla* decision could have changed anything in the instant case. Cassidy could

> have done nothing differently to change the effect of *Pullum* if it is applied retroactively."

The catch line to Ford's contention is "if it (*Pullum*) is applied retroactively." What this entire appeal is about is that *Pullum* should not be applied retroactively. Ford's surmise does not recognize what is at stake in Kenneth Cassidy's having acted in reliance on the Supreme Court's construction of Section 95.031(2) in *Battilla* and why the doctrine of fairness stands against applying retrospectively to Cassidy and the Court's *changed construction* of Section 95.031(2) in *Pullum*.

In point of reliance and fairness, Appellants brief pointed out:

> "Such a costly undertaking (institution of action) would not have been entered and pursued over a period of more than two and one-half years to near-point of full readiness for trial (set for January 27, 1986) without *a reliance, as evidenced,* on the law which existed at the time plaintiff instituted his action and which prevailed until *Pullum.*" (CIB-14)

PART II FORD'S ANSWER BRIEF MISAPPREHENDS PRINCIPLE OF LAW STANDING AGAINST RETROACTIVE APPLICATION OF *PULLUM* TO *CASSIDY*

A major portion of Ford's answer brief[3] is devoted to detailing precisely what is required in order to place a case within the ambit of *Chevron Oil Company v. Huson,* 404 U.S. 97 as applied in *International Studio Apartment Association, Inc. v. Lockwood,* 421 So.2d 1119 (Fla. App. 4 DCA, 1984). There is some confusion in Ford's under-

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[3] Comprises five of the nine pages of Ford's argument.

taking to relate this to *Cassidy*. For clarification, it should be noted that Appellants brief cite this federal case only for the purpose of bringing to the attention of the Court what the U.S. Supreme Court expressed on the doctrine of fairness, to wit:

> "To abruptly terminate this lawsuit that has proceeded through *lengthy* and no doubt, *costly discovery stages* for a year would surely be inimical to the beneficial purposes of the Congress."

While the substantive rationale of *Chevron* is clearly favorable to Appellant in that it forcefully stands for the just and fair principle that the law of an overruling decision not be applied retroactively to the cases of parties who acted in reliance on the law of the overruled decision, *Chevron* is federal and Plaintiffs position herein is fully secured, and more appropriately so by sticking to Florida law as given by our Florida Supreme Court. In this connection it is decisively significant to note that the Court in the subject case (*International Studio Apartment Association v. Lockwood*) advanced by Ford, the Court stated "Had the 1980 decision declaring the statute uncontitutional emanated from the Florida Supreme Court rather than the Supreme Court of the United States, it would have qualified as an 'overruling decision' *and the exception permitting prospective operation only would have applied*" at page 1121.

The exception to which the Court referenced its statement was set forth by the Court earlier in its opinion that "the rights, positions and courses of action of parties who have acted in conformity with, and in reliance upon, the construction given by a court of final decision to a statute should not be impaired or abridged by reason of a change

in judicial construction of the same statutes made by a subsequent decision of the same Court overruling its former decision."

Moreover, in *International Studio* cited the U.S. Supreme Court case of *Lemon v. Kurtzman,* 411 U.S. 192, wherein the Court stated:

> "(S)tatutory or even judge-made rules of law are hard facts on which people must rely in making decision and in shaping their conduct. This fact of legal life underpins our modern decisions recognizing *the doctrine of non-retroactivity.* Id. at 199 S. Ct. at 1468." See *International Studio* at 1122.

We respectfully submit that Ford in citing *International Studio* as authority for its position seeking to have the Court apply the overruling decision in *Pullum* to Cassidy has misapprehended the truth and reality of the law on retroactivity in this as in other instances of its answer brief, e.g. Ford's statement noted at pages 2-3 of Appellants brief herein.

No. 2 Reply to Answer Brief of

Appellee The Budd Company

POINT I THE OVERALL SCOPE OF APPELLEE BUDD'S ANSWER BRIEF, CONTENDING THAT *PULLUM* "MUST" BE APPLIED RETROACTIVELY TO APPELLANT CASSIDY'S PENDING ACTION, IS CONTRARY TO PREVAILING PRINCPLES OF LAW WHICH PROTECT CASSIDY'S SUBSTANTIVE RIGHTS IN HIS CAUSE OF ACTION WHICH ACCRUED PRIOR TO *PULLUM*

The answer brief of Appellee The Budd Company is massive. In order to avoid a situation of replying to the trees without addressing the forest, we begin Appellants

brief by reply to the overall argument implanted in Appellee Budd's brief.

[1] *Existing Rights Protected by the Rule Against Application of Overruling Decision Are Not Exclusively Contract and Property Rights.*

The gist of Budd's overall argument is that (a) there is almost never an occasion where the overruling decision of a court of last resort should not be applied retroactively to its overruled decision and (b) if and whenever there be an occasion for not applying the overruling decision retroactively the area of the law allowing it is so "*narrow*" that a case like the instant case, Cassidy, cannot pass through it. Specifically, Budd argues that unless pre-existing *contract* or *property* rights are impaired by a retroactive application of the overruling decision, the rule[4] against applying an overruling decision retroactively to the overruled decision does not apply.

The key word is not contract or property. The key word is "rights". The flaw in Budd's restrictive analysis is its confinement to the words "contract" and "property". The Florida Courts in myriad decisions have broadly acted firmly and zealously to protect the rights of parties against retroactivity, particularly where retroactivity would destroy the "substantive rights" of a party. It is clear that under almost all circumstances the courts will not apply a change in the law retroactively to a cause of action which accrued prior to the time that the law was changed. In *Foley v. Morris*, 339 So.2d 215 (Fla. 1976),

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[4] (T)o the general rule of prospective/retrospective operaeration of an overruling decision, there is an exception which, over a period of many years, has become well established as a separate rule, best characterized as *The Rule Against Applying an Overruling Decision Retroactively to the Overruled Decision.* (CIB-3)

the Supreme Court, noting that plaintiff's cause of action accrued on September 11, 1971, while a four year statute of limitations was in force, refused to bar plaintiff's action by retroactively applying a two year limitation prescribed by amendment of the statute which was not effective until July 1, 1972. In its decision, the Court recognized that "rights accrued, claims arising, proceedings instituted" under the prior law are not to be impaired by retroactively applying a subsequent change in the law to plaintiff's cause of action.

In *Bryant v. School Board of Duval County, Fla.*, 399 So.2d 417 (Fla. App. DCA 1, 1981) this court reversed the order of the Circuit Court dismissing plaintiff's cause of action (sounding in negligence) for applying retrorespectively to plaintiff's cause of action terms of a statute where plaintiff's cause of action accrued prior to enactment of the statute. The Court stated, "we agree with Bryant's argument that the abolition of his right to sue Rupp and Stasco for ordinary negligence is unconstitutional since it affects *rights which had become vested.*" In the fact of *Bryant* plaintiff's rights, which prevailed over retroactivity, vested when his cause of action accrued and he commenced his action. In *Bryant* there was no impairment of contract or property rights involved; only plaintiff's *substantive rights* existing in his cause of action which were not to be impaired by retroactivity.[5]

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[5] It may be noted, of course, that the decision in the cited case deals with a legislative enactment as affected by the question of retroactivity while the appeal herein deals with the question of retroactivity as affected by the court's construction of the subject statute. In each instance, however, the underlying considerations on questions of retroactivity are identical and the relevant principles of law are equally applicable to both.

Moreover, the decision of this Court in *Bryant,* which is in full accord with firmly established Florida law, *Seddon v. Hurpster,* 403 So.2d 409 (Fla. 1981); *Fleeman v. Case,* 342 So.2d 815 (Fla. 1976); *Trustees of Tufts College v. Triple R Ranch, Inc.,* 275 So.2d 521 (Fla. 1973), involving as it does a tort action and not a workmen's compensation claim, stands in solid reply to Budd's argument that the case of *Simmons v. City of Coral Gables,* 186 So.2d 493 (Fla. 1966) quoted in Appellants initial brief, must be disregarded as authority because it involved a workmen's compensation action. (BB-17) The challenged portion of Appellants initial brief reads as follows:

> "In *Simmons v. City of Coral Gables,* 186 So.2d 493, 495 (Fla. 1966), the Court explained: "The accident occurred on October 31, 1962, and therefore, the statutory *and decisional law* pertinent on that date must prevail." (CIB-10, 11) Emphasis Supplied.

Appellants initial brief further pointed out that similarly, at the time Appellant, Cassidy's, cause of action accrued (February 6, 1982), he acted upon rights therein by instituting the lawsuit herein under the law as it existed at the time. (CIB-10) This is the factual situation involved in the instant case. It is apposite to the applicable law of Florida standing against Budd's position which Budd's brief does not, nor can it, rebut.

[2] *Failure of Court to Assert "Prospective" Only Proviso in Overruling Decision Does Not, In and of Itself, Mandate That It's Overruling Decision Must Be Applied Retroactively*

In its answer brief Budd takes the position that simply because the Court in its *Pullum* decision failed to assert a "prospective" only proviso, *Pullum* must be applied retroactively to Cassidy. Budd tightly contends that "the

specific declaration of 'a prospective only' proviso must be contained in the overruling opinion" (BB-8) and "unless *specifically* declared by the opinion to have prospective effect only" the decision must be applied retroactively. (BB-4) The first consideration which renders Budd's contention unacceptable is that it consists entirely of Budd's own undocumented opinion. Budd's brief does not cite a single case prescribing that such declaration of "prospective only" must be provided in the overruling decision in order for it not to apply retroactively.

But, on the other hand, for a case that totally repels Budd's contention we need to look no further than the familiarly cited in the briefs of this appeal, *Florida Forest and Park Service v. Strickland,* 18 So.2d 251 (Fla. 1944) viewed vis-a-vis *Tigertail Quarries, Inc. v. Ward,* 16 So.2d 812 (Fla. 1944). In Strickland, as now in the instant case, Cassidy, parties defendant sought to have the Court apply its overruling decision in *Tigertail Quarries* retroactively against *Strickland.*[6] Examination of *Tigertail Quarries* discloses that there is no specific declaration of a "prospec-

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[6] The large amounts of attention given to *Florida Forest and Park Service v. Strickland,* supra by Appellees in their respective answer briefs enunciated demonstrates that Appellees fully recognize the rule enunciated by the Florida Supreme Court in *Strickland* against allowing the rights of parties to be impaired or destroyed by applying an overruling decision retroactively to the Court's overruled decision is controlling to the question to be decided in this appeal. And knowing as they do that Appellees cannot prevail in this appeal so long as *Strickland* remains standing in this appeal in favor of Appellants position and against Appellees position, Ford, Budd and Firestone, in their answer briefs, attempt every conceivable argument to read out of this appeal the law of *Strickland* applicable to *Cassidy,* all to no avail.

tive only" proviso to be found anywhere in the entire decision. Since the Court refused to apply its overruling decision in *Tigertail Quarries* to *Strickland,* notwithstanding the absence of a "prospective only" proviso in *Tigertail Quarries,* it is obvious that Budd's contention is totally erroneous. Clearly there is no merit in the argument that *Pullum* must be applied retroactively because a "prospective only" proviso is not incorporated in it.

[3] *The Attempt of Budd's Answer Brief to Have the Issue of This Appeal Substituted by One Not the Issue is Inappropriate and Irrelevant to the Question Presented to This Court for Determination*

After attempting throughout the course of its answer brief to confuse and cloud the real matter on appeal in the instant case, Cassidy,—i.e. the question of whether or not the Court below erred in applying *Pullum* retroactively to Cassidy—Budd near the close of its brief acknowledges the true aim of its attempt at avoidance by stating:

> "What appellee seeks is the statute of repose be applied to the instant case."

Obviously and very simply what Budd seeks is to have the appeal herein treated as one in which Appellants action accrued and was instituted at the time of the Court's construction of Section 95.031(2) Florida Statutes in *Pullum* and not as it was, within the time of the Court's construction of Section 95.031(2) in *Battilla.* This, of course, is so far off base as hardly to call for even the slightest argument.

Appellees originated the question of retroactivity in moving the Circuit Court on summary judgment to dismiss Appellants action by applying *Pullum* retroactively to

Cassidy. The inception of the appeal herein is from the order of the Circuit Court which "concluded *Pullum* has retroactive application". (R-50) It is not [sic] logical and would not appear permissible for Appellee to renounce and switch from the ground in an attempt to overcome the weight of Appellants position which demonstrates the error of the Court below in concluding that *Pullum* applies retroactively to Cassidy.

Likewise, repeated claims in Budd's answer brief as to the merits and purposes of Section 95.031(2) as perceived by Appellants are irrelevant to the issue of this appeal. The Court's construction of Section 95.031(2) at the given time control. Parties are required to act in reliance upon the law in force at the time: *Pullum* as of now; *Battilla* within the time Appellants cause of action accrued and was acted upon.

POINT II THE ANSWER BRIEF OF BUDD CITES CASES AND PRESENTS ARGUMENTS NOT IN CONTEXT OF OR AMENABLE TO THE PRINCIPLES OF LAW THAT CONSTITUTE THE RULE AGAINST RETROACTIVELY APPLYING AN OVERRULING DECISION OF THE COURT TO ITS OVERRULED DECISION

EXAMPLE: *Florida East Coast Railway Co. v. Rouse,* 194 So.2d 260 (Fla. 1966)

As footnote at page 16 of Budd's answer brief under Point I-B, Budd cites the case of *Florida East Coast Railway Company v. Rouse,* 194 So.2d 260 (Fla. 1966), citing *Rouse* as a case "wherein the Supreme Court stated that the general rule is that an appellate court is to apply the prevailing law at the time of the appellate disposition

and not the law prevailing at the time of the rendition of the judgment."

Appellee Budd's citation of this case and accompanying statement is an example of cases and arguments presented in Budd's answer brief which emanate from the Court's resolution of questions arising out of circumstances inapposite to the question involved in this appeal. That the time factor in *Rouse* is not appropriate for application to *Cassidy* is clearly spelled out by the Court in *State v. Lavazzoli,* 434 So.2d 321 (Fla. 1983) wherein the Court stated.

> "While as a general rule it is true that disposition of a case on appeal is made in accordance with the law in effect at the time of the appellate court's decision rather than the law in effect at the time the judgment appealed from was rendered, *Hendeles v. Sanford Auto Auction, Inc.,* 364 So.2d 467 (Fla. 1978); *FLORIDA EAST COAST RAILWAY V. ROUSE,* 194 So.2d 260 (Fla. 1966), *this rule is not applicable when a substantive right is altered."*

This exposes the fact that *Rouse* as cited by Budd is not applicable to *Cassidy* in which substantive rights are involved. Elsewhere in its decision in *Lavazzoli,* the Court stated that the rule against retroactivity "applies with particular force to those instances *where retrospective operation of the law would impair or destroy existing rights."*

No. 3 Reply to Answer Brief of Appellee Firestone Tire and Rubber Company

(Preface)

Replying to Appellees answer briefs in the order received, Appellants turn now to the answer brief of Ap-

pellee Firestone. A front to back careful reading of Firestone's answer brief discloses little that is not a repeat of arguments made in the answer briefs of Appellees Ford and Budd, heretofore replied to. Therefore, in the interest of not burdening this Court with repetitious arguments, Appellants reply will be curtailed and limited, by-passing insofar as possible reply to points of Firestone's answer brief which would serve only to duplicate replies already made to the answer briefs of Appellees Ford and Budd.

I. WHERE CITATIONS IN FIRESTONE'S ANSWER BRIEF ARE SHORTFALLED BY DELETIONS OR OTHERWISE FIRESTONE'S ARGUMENTS THEREABOUT ARE RENDERED INVALID

1. THE PRIMARY MEANING and teaching of *Christopher v. Mungen* 55 So. 273 (Fla. 1911), as a case involving the rule against retroactivity, was inadvertently overlooked or disregarded by Firestone in quoting only one-half of the legal substance making up the rule against retroactivity as declared therein by the Florida Supreme Court:

(a) *What Firestone Quoted:*

> "Where a statute is judicially adjudged to be unconstitutional, it will remain inoperative while the decision is maintained; but if the decision is subsequently reversed, *the statute will be held to be valid from the date it first became effective. . .*" (TB-15) Emphasis Firestone's.

(b) *What Firestone Did Not Quote:*

> Beginning immediately following the word "effective. . ."
>
> " . . . even though rights acquired under particular adjudications where the statute was held to be

> invalid *will not be affected by the subsequent decision* that the statute is constitutional."

Significantly, the foregoing portion of the language of the Supreme Court in *Mungen* deleted by Firestone in its statement to this Court enunciates the principle of law on retroactivity directly applicable to the factual situation as it exists in the pending appeal. The history of the Court's coming to the issue of retroactivity in *Mungen* is identical to the history of the issue of retroactivity reaching this Court in *Cassidy*. In *Mungen*, as in the pending *Cassidy* appeal, a court of last resort, the Florida Supreme Court, first construed the statute involved to be *unconstitutional*, as did the Court in *Battilla*, and subsequently the Court construed the subject statute to be *constitutional*, as did the Supreme Court in *Pullum*. Moreover, neither Firestone nor Appellees Ford and Budd in any of the respective answering briefs have cited *a single case* which repudiates or contradicts the rule against retroactively enunciated in *Mungen*.

2. FIRESTONE CLAIMS that Plaintiff, Cassidy, "is in the same position as the plaintiff was in the *Pullum* case." Such is not the case. *Cassidy* was brought *in reliance* on the Supreme Court's decision in *Battilla; Pullum* was brought *in defiance* of the decision of the Supreme Court in *Battilla*. *Pullum* challenged *Battilla* at both this First District Court of Appeal and Supreme Court levels as denying equal protection of laws. *Pullum's* action was pursued not because of any decision of the Court in his favor, but in spite of decisions against his position. *Cates v. Graham*, 451 So.2d 475 (Fla. 1984); *Purk v. Federal Press Company*, 387 So.2d 354 (Fla. 1980); *Bauld v. J. A. Jones Construction Company*, 357

So.2d 401 (Fla. 1978). This appellate court in the main body of its opinion in *Pullum v. Cincinnati, Inc.*, 458 So.2d 1136 (Fla. App. 1 Dist. 1984) stated:

> "However, in *Purk*, the plaintiff also contended that the statute denied her equal protection of the laws which contention was rejected by the Supreme Court." *Id.* 1139
>
> * * * * * *
>
> "The Supreme Court having denied in *Purk* the equal protection attack on the subject statute, we likewise reject such attack in the instant case." *Id.* 1139

Pullum was not in the position of having acted in reliance on any decision of the Supreme Court but in defiance of a number of contrary decisions. Clearly, in *Pullum* no issue was raised or question presented involving retroactivity.

II. FIRESTONE'S ARGUMENT THAT SECTION 95.031(2) FLORIDA STATUTES AS IT EXISTED PRIOR TO *BATTILLA* SHOULD BE APPLIED TO *CASSIDY*, A CASE BROUGHT AFTER *BATTILLA* AND PRIOR TO *PULLUM* WHEN SECTION 95.031(2) DID NOT EXIST IS WITHOUT FOUNDATION IN FACT OR THEORY.

Firestone's theory that, notwithstanding the fact that Appellant Cassidy's action accrued and was commenced after *Battilla* when Section 95.031(2) did not exist, because of *Pullum* it now becomes possible for the Court to reach back and apply Section 95.031(2) to *Cassidy*. Firestone hangs its theory on *Christopher v. Mungen*, supra. (TB-15) More accurately stated, Firestone hangs its theory on the first half of the rule pronounced in *Mungen*, which holds that where a court construes a statute as con-

stitutional and later construes it as unconstitutional "the statute will be held to be valid from the date it first became effective." As heretofore shown under Point I above ends its presentment of *Mungen* without accounting for the last half of the Court's declaration which is an integral part of and necessary to the full and correct meaning of the rule stated in *Mungen.*

After declaring that the statute first held to be unconstitutional will be held valid form the date it first became effective, the Court effectively concluded, without qualification or ambiguity, that rights acquired by actions taken while the statute was held to be unconstitutional, "will not be affected by the subsequent decision that the statute is constitutional." What Firestone seeks to do is to restrict the rule enunciated in *Mungen* with qualifying ambiguity of its own making which would take the true meaning out of the declaration of the Court and the very words it used to express its declarations. The Court held very directly and specifically that rights acquired while the statute was held to be unconstitutional were not to be affected by "the *subsequent* decision" declaring the statute to be constitutional. The flaw in Firestone's theory is that it goes strictly on the "subsequnt decision". *Pullum* has declared Section 95.031(2) constitutional but the very thing established in the rationale of *Mungen* is that even though the "subsequent decision" declares the statute constitutional, as *Pullum* has now declared Section 95.031(2) to be, rights acquired while the statute was held to be unconstitutional cannot be destroyed by subjection to the "subsequent decision."

Here the reader of Appellees answer brief is again made aware of the fact that the arguments relied upon by

Appellants are not responsive to, avoid and leave unrebutted the applicable law of this appeal, that an overruling decision of a Court is not to be applied retroactively to the overruled decision where substantive rights of parties who acted in accordance with the overruled decision would be impaired or destroyed.

CONCLUSION

This Court is requested by Appellees Ford, Budd and Firestone to apply *Pullum* retroactively to *Cassidy*. The facts and *applicable* law of this appeal forcefully demonstrate that Appellees request to the Court is inapt and unwarranted.

Appellants initial brief confronted Appellees with the applicable law of nonretroactivity involved in this appeal, to wit, "*where a statute or law has received a given construction by a court of last resort, the rights, positions, and courses of action of the parties who have acted in conformity with and in reliance upon such construction of the statute are not in anywise impaired or disturbed by reason of a change in the construction of the same statute made by a subsequent decision of the court of last resort in overruling its former decision.*"

This rule of law pertaining to prospective/retrospective operation of an overruling decision of the Court, applicable to the facts of the instant case, is what is involved in this appeal; nothing less and nothing different, as Appellees have tried to make it become in their answer briefs, and likewise, parties amici curiae in their answer briefs fail from start to finish to address an answer to this principle of law or cite authority from any case to contradict it.

The instant case is firmly lodged in the above stated principle of law and Appellants failure to dislodge it or repudiate the principle of law in which it is lodged nullifies and renders Appellees position and arguments therein without relevance and beside the point as to the facts and applicable law involved in this appeal.

Appellee Budd, like Appellees Ford and Firestone, argues at great length that notwithstanding the applicable rule of law against retroactivity so fully enunciated in *Florida Forest and Park Service v. Strickland,* supra, and controlling in this appeal, all of the facts of nonretroactivity applying in *Cassidy* must be stripped from Cassidy, disregarded and ignored and have Section 95.031(2) as it existed prior to *Battilla* brought into place to bar Cassidy's action. Implicit in Appellees studied efforts to find, and even create, some way to get around *Strickland* is their recognition, if not admission, that under the facts and law of this appeal in *Strickland, Pullum* is not to be applied retroactively to *Cassidy.* In a last ditch attempt to escape the legal jaws of *Strickland,* Appellees argue that (a) in order for the rule of law in *Strickland* to apply contract or property rights must be impaired and (b) unless the Court's overruling decision has in it the overruling decision must be applied retroactively. Appellees argument (a) is repelled by the decision of this Court in *Bryant v. School Board of Duval County, Fla.,* supra.

Argument (b) is felled by *Tigertail Quarries, Inc. v. Ward,* supra, at page 16 vis-a-vis *Strickland* at page 17 of reply brief. At this point we will not further belabor the conclusion of Appellants reply brief with other reasons why Appellee answer briefs do not meet the test of their contention that *Pullum* should be applied retroactive to *Cas-*

sidy. And we would not have presented this much substantive argument in the conclusion, except for the fact that the massive amounts of argument in the answer briefs of Appellees tend to obscure the real issue of this appeal and the correct law relative to this appeal.

In light of the foregoing, we respectfully submit that the Circuit Court in ordering that *Pullum* be applied retroactively to *Cassidy* was in error and the judgment of the Circuit Court should be reversed.

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/s/ Thomas T. Remington
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INDEX ON APPENDIX

CASES

Felder v. Heim Corporation, Case No. 85-5487-CO (17th Cir. Ct., Broward, Dec. 23, 1985)

Owens v. The Firestone Tire and Rubber Company, Case No. 84-350 Cir-T-10 (M.D. Fla. Jan. 28, 1986)

Harp v. SAFE-LAD Manufacturing Co., et al, Case No. 83-10545-CA (4th Cir. Ct., Duval, March 10, 1986)

Dease v. Jeep Corporation and American Motors Corporation, Case No. CI 85-460-Cir.-ORL (M.D. Fla. Jan. 16, 1986)

IN THE CIRCUIT COURT IN AND FOR
BROWARD COUNTY, FLORIDA

GAIL FELDER,	)	
	)	
Plaintiff,	)	
	)	CASE NO:
v.	)	85-5487-CO
	)	
HEIM CORPORATION, POSITIVE SAFETY MANUFACTURING COMPANY and A & M MACHINERY COMPANY, INC.,	)	
	)	
Defendants.	)	
	)	

ORDER ON DEFENDANTS' MOTIONS
FOR SUMMARY JUDGMENT

THIS CAUSE came on to be heard on the Defendant's, HEIM CORPORATION and A & M MACHINERY COMPANY, INC., Motions for Summary Judgement. The Court after hearing argument of counsel, reviewing Memorandums of Law and Affidavits, and being fully advised in the premises makes the following findings of fact and conclusions of law:

1. This action involves a products liability claim wherein it is alleged that a punch press was in some manner defective. The parties have stipulated that the accident in question occurred twelve years and two months after the date of delivery of the product to its original purchaser; to wit, the product was delivered in March, 1972; and the accident occurred in May, 1984.

2. Suit was timely filed on March 3, 1985, and there is no defense based on the Statute of Limitations.

3. The sole basis for the Defendants' Motions for Summary Judgment is that the cause of action is barred by the twelve (12) year Statute of Repose, Florida Statute § 95.031.

4. At the time when the Plaintiff was injured and at the time when this law suit was commenced, the Supreme Court had held in *Battilla v. Allis Chalmers Manufacturing Company,* 392 So. 2d 874 (Fla. 1980) that the twelve (12) year Statute of Repose, Florida Statute § 95.031, was unconstitutional as applied to facts consistant with the facts in the instant case.

5. On August 29, 1985, in *Pullum v. Cincinnati, Inc.,* 10 FLW 428 (Fla. August 29, 1985), the Supreme Court receded from its express holding in *Battilla,* supra, and held that the twelve (12) year Statute of Repose was no longer unconstitutional.

6. It is stipulated by counsel and the Court finds that the Florida Supreme Court in the *Pullum* decision did not indicate whether the holding in *Pullum* should be applied both retroactively and prospectively, or whether it's holding should only be prospective as to future cases.

7. The Plaintiff, GAIL FELDER, filed her Complaint (March 3, 1985) prior to the publication of the *Pullum* decision (August 29, 1985) and at a time when the law of Florida as stated by the Supreme Court was that the twelve (12) year Statute of Repose was unconstitutional as applied to those facts.

8. Based upon argument of counsel and the case law presented to me, this Court finds that the ruling of law set forth in *Pullum* is to be applied prospectively only and should not be applied retroactively as to cases which were filed prior to the *Pullum* decision; to wit, August 29, 1985. Therefore, as to the Plaintiff in the instant case, the twelve (12) year Statute of Repose does not act to bar this cause of action.

WHEREFORE, IT IS ORDERED AND ADJUDGED that the Motions for Summary Judgment of the Defendants, HEIM CORPORATION and A & M MACHINERY COMPANY, INC., are denied.

DONE AND ORDERED at Fort Lauderdale, Broward County, Florida, on this 23rd day of December, 1985.

/s/ JOSEPH E. PRICE, JR
Circuit Court Judge

A TRUE COPY

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CLIFFORD OWENS,

Plaintiff,

—vs—

CASE NO.
84-350 Civ-T-10

THE FIRESTONE TIRE & RUBBER COMPANY,

Defendant.

_____/

ORDER

For the Court's consideration are the Defendant's motion for summary judgment and motion for leave to amend its answer. This is an action in which the Plaintiff alleges personal injury as a result of the explosion of a tire which was being inflated on a "multi-piece wheel designed and manufactured by Firestone." The Plaintiff alleges negligence, strict liability and misrepresentation as the basis for his claims.

1. *Defendant's motion for leave to file an Amended Answer and Affirmative Defenses.*

The Plaintiff concedes that the Defendant should be granted leave to file the Amended Answer and, therefore, the motion is GRANTED. The Clerk is directed to file the Defendant's Amended Answer as of this date.

2. *Defendant's renewed motion for summary judgment.*

The Defendant relies on Section 95.031(2), Florida Statutes, in support of its motion which provides in part:

> (2) Actions for products liability . . . must be begun within the period prescribed in this chapter . . . but in any event within 12 years after the date of delivery of the completed product to its original purchaser . . . regardless of the date the defect in the product . . . was or should have been discovered.

In support of its motion the Defendant has filed the affidavit of Robert Lee, an employee of the Defendant. The affidavit states that an examination of the "rim base" and the "side ring" produced in discovery by the Plaintiff reveal that the former was manufactured in June 1969 and the latter in January 1965. The affiant further states that Firestone did not maintain inventories in those products until 1973 and 1974; rather, they were typically sold, shipped and delivered to purchasers within four to six weeks after their manufacture and in no event later than six months after their manufacture.

Accepting the latest date for sale contemplated by the affiant, this complaint was clearly filed more than twelve (12) years after their delivery to their original purchaser. In *Pullum v. Cincinnati, Inc.*, 476 So.2d 657, 659 (Fla. 1985), the Florida Supreme Court held:

> We recede from this decision, (*Battilla v. Allis Chalmers Manufacturing Co.*, 392 So.2d 824 (Fla. 1980)), and hold Section 95.031(2) is not unconstitutionally violative of Article I, section 21 of the Florida Constitution.

In opposing summary judgment the Plaintiff asserted numerous arguments, however only one of those necessitates discussion. The Plaintiff asserts that the "statute

of repose" is unconstitutional as it bars this action. This action was filed on March 6, 1984 and, when filed, was not barred by Section 95.031(2) because the statute had been declared unconstitutional in the Florida Supreme Court decision in *Battilla, supra.* The rights of the Plaintiff, as far as Section 95.031(2) is concerned, must be determined as they existed when the case was filed.*

Accordingly, the Defendant's motion for summary judgment is DENIED.

IT IS SO ORDERED.

DONE and ORDERED at Tampa, Florida, this 28th day of January, 1986.

/s/ Wm. Terrell Hodges
UNITED STATES DISTRICT JUDGE

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* There is a serious question as to whether the *Pullum* decision has any retroactive effect.

> . . . if a decision holding a statute unconstitutional is subsequently overruled, the statute will be held valid from the date it first became effective . . . however . . . where a statute has received a given construction by a court of last resort, and property or contract rights have been acquired in accordance with such construction, they will not be destroyed by giving to a subsequent overruling decision a retrospective operation. 13 FLA. Jur. 2d, *Courts and Judges* 159 (1979).

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NUMBER: 83-10545-CA

DIVISION: "O"

JOHN H. HARP and BONITA HARP, his wife,

Plaintiffs,

vs.

SAFE-LAD MANUFACTURING CO., a foreign corporation, and AMERICAN STATES INSURANCE CO., an insurance corporation, and THOMPSON METAL FAB, INC., a foreign corporation,

Defendants.

ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This cause came on for hearing upon the Motion For Summary Judgment filed by the Defendant, SAFE-LAD MANUFACTURING COMPANY.

Arguments of counsel were heard and the only issue to be decided herein is a matter of law.

The essential facts are as follows: The Defendant sold a ladder in August, 1961, from which the Plaintiff herein was injured in August, 1981. He filed suit for damages in September, 1983. Prior to the date of the injury, Florida had a statute of repose which, in effect, limited the filing of all causes of action to within 12 years from the date of original delivery from the manufacturer.

That statute was declared unconstitutional in December, 1980. *Battilla v. Allis Chalmers Manufacturing Com-*

pany, 392 So.2d 874 (Fla., 1980). That same statute and the validity of it was reinstated by the Florida Supreme Court in August, 1985. *Pullum v. Cincinnati, Inc.,* 476 So.2d 657 (Fla., 1985)

The Plaintiff's injury and the filing of his Complaint occurred in the interim. The Defendant, in its Motion For Summary Judgment, contends that *Pullum* is retroactive in application and therefore bars Plaintiff's claim since the filing of his Complaint occurred 22 years after delivery of the product to its original purchaser. The Plaintiff counterargues that *Pullum* should not be applied retroactively since the same statute of repose, Section 95.031(2), Florida Statutes, had been declared unconstitutional by the Florida Supreme Court and it was on that ruling and by its authority that the Plaintiff was authorized to commit himself to a course of action to his monetary detriment to claim for damages.

Florida Forest and Park Service v. Strickland, 18 So.2d 251 (Fla., 1944) essentially states that a decision of a court of last resort overruling a former decision is retrospective as well as prospective in its operation unless specifically declared by the Opinion to have a prospective effect only; however, the Court recognized a certain well-recognized exception that where property or contract rights have been acquired under and in accordance with such judicial statutory construction such right should not be destroyed or impaired by retrospective operation of a later contrary decision. That Court, in dictum, went on to say that some of the courts have gone so far as to adopt the view that the rights, positions, and *courses of action* of parties who have acted in conjunction with, and in re-

liance upon, the construction given by a court of final decision to a statute should not be impaired or abridged by reason of a change in judicial construction of the same statute made subsequently overruling its former decision. (Emphasis added.)

The Court finds that at the time of the injury and the filing of Plaintiff's Complaint, it was authorized by the highest court of this state to commit himself to a course of action in reliance thereon to the monetary amount of $3,182.23 (see Plaintiff's counsel's affidavit).

Upon consideration of the foregoing, it is, thereupon,

ORDERED:

That the Motion For Summary Judgment filed by the Defendant, SAFE-LAD MANUFACTURING COMPANY, be and the same is hereby denied.

DONE AND ORDERED, in Chambers, at Jacksonville, Duval County, Florida, this 10th day of March, 1986.

ORIGINAL SIGNED:
A. C. SOUD, JR.
A. C. SOUD, JR., Circuit Judge

Copies to:

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

CASE NO. CI 85-460-CIV-ORL

RONALD E. DEASE, etc,
et al.,

vs.

JEEP CORPORATION and
AMERICAN MOTORS CORPORATION,

Defendants

DENIED and SO ORDERED
this 16 day of Jan., 1986
/s/ G. Kendall Sharp
United States District Judge

MOTION FOR SUMMARY JUDGMENT

(Filed December 28, 1985)

Defendants, JEEP CORPORATION and AMERICAN MOTORS CORPORATION, move for summary judgment on the ground that the undisputed facts establish that they are entitled to judgment as a matter of law.

MEMORANDUM

Plaintiffs allege that Ronald Dease sustained personal injuries and that his parents sustained derivative losses as a result of a motor vehicle accident that occurred on September 16, 1983 because the vehicle he was driving was defective. They have sued defendants for marketing the vehicle. It is undisputed that the vehicle, a 1969 Jeepster

Commando, was delivered to its original purchaser more than twelve years before this actions was filed. (*See* annexed affidavit of Ray W. Rowell and title certificates) Consequently, this action is time barred.

Section 95.031(2), Florida Statutes, provides that an action for products liability may not be brought more than twelve years after the date of delivery of the completed product to its original purchaser. The constitutionality of this statute was upheld recently by the Florida Supreme Court in *Pullum v. Cincinnati, Inc.*, — So.2d —, Case No. 66,198, 10 *Fla.L.Wkly.* 198, 10 *Fla.L.Wkly.* 428 (Fla. August 29, 1985).

WHEREFORE, defendants request that final summary judgment be entered in their favor because this action is untimely.

I HEREBY CERTIFY that a copy of the foregoing Motion for Summary Judgment was mailed this 23rd day of December, 1985 to:

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

RONALD DEASE and his parents, GEORGE DEASE and CAROLYN DEASE,

Plaintiffs,

vs. CASE NO.: CI 85-460-CIV-ORL

JEEP CORPORATION and AMERICAN MOTORS CORPORATION,

Defendants.

_____/

MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Introduction

This action was commenced in the Circuit Court for the Ninth Judicial Circuit for Orange County, Florida, on 9 January 1985. It was later removed to the United States District Court for the Middle District of Florida on 19 April 1985. The Complaint alleges that the plaintiff, Ronald E. Dease, was injured on or about 16 September 1983 by reason of defects in the design and/or manufacture of a Jeep Jeepster Commando.

When this suit was filed, Section 95.11(3), Fla. Stat. (1983), provided a four-year period for the commencement of such actions with the period commencing to run from the date of injury. Also at the time suit was filed, Section 95.031(2), Fla. Stat. (1983) (enacted in 1977), provided:

> "Actions for products liability . . . must be begun within the period prescribed in this chapter, with the

> period running from the time the facts giving rise to the cause of action were discovered or should have been discovered with the exercise of due diligence, instead of running from any date prescribed elsewhere in § 95.11(3), but in any event within 12 years after the date of delivery of the completed product to its original purchaser. . . ."

However, in 1980, the Florida Supreme Court had held that Section 95.031(2), under Florida constitutional law, was invalid as applied to persons injured over 12 years from the date of the product's first sale. *Battilla v. Allis Chalmers Manufacturing Co.*, 392 So.2d 874 (Fla. 1980). *Battilla* represented the law of Florida at the time Mr. Dease's suit was started; therefore, at that time, the only applicable statute of limitations was Section 95.11(3), which as noted provided a four-year period of limitation commencing with the date of injury. The Defendants recognized that such was the state of Florida law by not raising a defense based on the statute of limitations in the initial answer.

On 29 August 1985, after the present action was commenced, the Florida Supreme Court in *Pullum v. Cincinnati,* 476 Do.2d [sic] 657 (Fla. 1985) receded from the position it had taken in *Battilla* and held that Section 95.031(2) bars claims for injuries caused by defective products where such claims are instituted in excess of 12 years from the date of the product's first sale, *even though the injury did not occur within the 12-year period.* After *Pullum,* the Defendants amended their answer to raise a defense based on the statute of limitations and now argue on their Motion for Summary Judgment that Section 95.031(2), Fla. Stat. (1983), as construed in *Pullum,* barred Mr. Dease's claim *before his accident and injury occurred.*

Discussion

The U.S. District Court for the Northern District of Florida and the Florida Circuit Court for Broward, County, Florida, have both held that *Pullum* does not apply retroactively to cases which were filed and not otherwise time-barred before the effective date of *Pullum,* i.e., 29 August 1985. The principles on which these decisions (copies attached hereto) are based are equally applicable to Mr. Dease's case and mandate a denial of the summary judgment.

In 1961, in *Rodrigue v. Aetna Casualty & Surety Co.,* 392 U.S. 352, 23 LEd.2d 360, 89 S.Ct. 1835 (1969), the Court held that the Outer Continental Shelf Lands Act (43 USC § 1331) did not make federal admiralty law applicable to employment-related accident claims by a person injured on an oil rig on the outer continental shelf. It held that the claims of such persons would be governed by the law of adjacent states. In *Chevron Oil Co. v. Huson,* 404 U.S. 97, 30 LEd.2d 296, 92 S.Ct. 349 (1971), the issue before the Court was whether or not the respondent's claim for injuries suffered in 1965 on a drilling rig operated by the petitioner, Chevron Oil Co., on the outer continental shelf off the Gulf Coast of Louisiana was time-barred by the Louisiana one-year statute of limitation. The Supreme Court held that the *Rodrigue* opinion would not be applied retroactively to the respondent where the respondent's injury occurred more than three years before the announcement of the *Rodrigue* decision and the action was instituted more than one year before the decision.

The Court set forth three considerations for the determination of the issue. The first was whether the opinion

in question established a new principle of law either by overruling clear past precedent or by deciding an issue of first impression. The second was whether retroactive application of the opinion would further or retard the rule of decision. The final criterion was whether an injustice would result from retroactive application of the opinion.

With regard to the first criterion, it is obvious that *Pullum* overruled clear past precedent, i.e., *Battilla, supra.* With regard to the second criterion, giving retroactive operation to *Pullum* will in no respect further or retard its operation. Finally, it is clear that an inequity will result from a retroactive application of the *Pullum* decision. The most clear evidence of this is the fact that a retroactive application of the opinion will eliminate Mr. Dease's right to litigate a fully matured and viable claim which he was diligently pursuing when *Pullum* was announced. Had the Florida legislature, as opposed to the Florida Supreme Court, shortened the time for the commencement of Mr. Dease's claim by a statutory enactment, principles of fundamental fairness guaranteed by the Fourteenth Amendment to the U.S. Constitution would have required the legislature to provide Mr. Dease a minimum reasonable period of time for the commencement of his action. Please see *Caldwell v. Alabama Drydock and Shipbuilding Co.*, 161 F.2d 83 (5th Cir. 19—), wherein the court stated:

> "The lawmaking body is the primary judge as to what is a reasonable time limitation for the bringing of actions, and courts will not inquire into the wisdom of a legislative decision establishing a period of limitation unless the time allowed is so manifestly insufficient as to amount to a denial of justice."

Please also see *Wheeler v. Jackson,* 34 LEd. 659, wherein the U.S. Supreme Court stated at page 663:

> "It is the settled doctrine of this court that the legislature may prescribe a limitation for the bringing of suits where none previously existed, as well as shorten the time within which suits to enforce existing causes of action may be commenced, provided, in each case, a reasonable time, taking all the circumstances into consideration, be given by the new law for the commencement of suit before the bar takes effect."

If fundamental fairness required legislative deference to Mr. Dease's claim, it logically follows that fundamental fairness at least requires a prospective-only application of the *Pullum* opinion which has exactly the same effect as legislation shortening the period of the statute of limitations.

Based upon the *Chevron* opinion, Chief Judge Stafford of the U.S. District Court for the Northern District of Florida in *Thorsby and Thorsby v. William Stash White & Co.,* Case No. 84-7230, held that *Pullum* has no retroactive application to a product liability claim then in suit and not otherwise time-barred. Likewise Judge Price of the Circuit Court for Broward County, Florida, in *Felder v. Heim Corp. et al.,* Case No. 85-5487, held that *Pullum* would have prospective application only to claims filed subsequent to 29 August 1985.

The principles of *Chevron, supra,* have been expressly recognized by the Florida District Court of Appeal for the Fourth District in *International Studio Apartment Association, Inc., et al v. Lockwood,* 421 So.2d 1119, 1121, and were applied to deny retroactive application to a holding by both the U.S. Supreme Court and the Supreme

Court of Florida that § 28.33, Fla. Stat. (1977) (authorizing clerks of circuit courts to invest registry funds and retain the interest) was unconstitutional.

In *Florida Forest and Park Service v. Strickland,* 18 So.2d 251 (Fla. 1944), the appellee had filed a workmen's compensation claim against his employer, the appellant The claim was heard and denied by a deputy commissioner of the Florida Industrial Commission. Thereafter the order of the deputy commissioner was appealed by the claimant to the circuit court for Taylor County, Florida. The circuit court reversed the deputy commissioner. An appeal was then taken by the employer and the employer's insurance carrier to the Florida Supreme Court. After the appeal was filed, the Florida Supreme Court in *Tigertail Quarries, Inc. v. Ward,* 16 So.2d 812 (Fla. 1944), held that orders of a deputy commissioner may not be appealed directly to a circuit court, but must be appealed first to the full Commission. Based on the *Tigertail* decision. the appellant in *Florida Forest* contended that the circuit court lacked jurisdiction to enter the judgment reversing the deputy commissioner. The Florida Supreme Court held that *Tigertail* would not be given retroactive effect because the procedure and positions taken by the appellee were consistent with the Florida Workmen's Compensation statute as it had previously been construed by a controlling opinion from that court. The Florida Supreme Court in its opinion in *Florida Forest* recognized that generally decisions of a court of last resort overruling former decisions may be given retroactive application but recognized an exception where positions have been taken and rights have accrued under prior law. The Court stated:

"To this rule, however, there is a certain well-recognized exception that where a statute has received a given construction by a court of supreme jurisdiction and property or contract rights have been acquired under and in accordance with such construction, such rights should not be destroyed by giving to a subsequent overruling decision a retrospective operation. . . . Based upon a recognition of this commonsense exception to the rule, some of the courts have gone so far as to adopt the view that the rights, positions, and courses of action of parties who have acted in conformity with, and in reliance upon, the construction given by a court of final decision to a statute should not be impaired or abridged by reason of a change in judicial construction of the same statute made by a subsequent decision of the same court overruling its former decision. Accordingly, such courts have given to such overruling decisions a prospective operation only, in the same manner as though the new construction had been added to the statute by legislative amendment. . . ." (page 253)

Thus, under either the principles of *Chevron* or *Florida Forest, supra,* the opinion in *Pullum* should not be given retroactive effect to terminate rights which had accrued in favor of the Plaintiff under the law of Florida prior to *Pullum.* To do so would be so fundamentally unfair as to be a violation of the Fourteenth Amendment to the United States Constitution.

It is respectfully submitted on the above authority that Defendants' Motion for Summary Judgment should be denied.

DATED this —— day of ————, 1986.

LOWNDES, DROSDICK, DOSTER,
KANTOR & REED, P.A.

By: John A. Reed, Jr.
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail to GORDON JAMES, III, ESQ., 707 Southeast Third Avenue, 5th floor, Ft. Lauderdale, FL 33316; JOHN R. OVERCHUCK, ESQ., 90 E. Livingston St., Orlando, FL 32802; and BRIAN D. HILL, ESQ., P. O. Box 2873, Orlando, FL 32802, this — day of ————, 1986.

John A. Reed, Jr.